

**MOHD HARUN INDRA PG ELIAS v. SHIM VUI GEH
& ORS AND ANOTHER CASE**

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[SUIT NOS: SDK-22NCvC-26-12-2019 & SDK-22NCvC-1-1-2020]
31 MAY 2022

Abstract – *The borrowers, despite having undertaken and agreed to pay the sums of indebtedness by deeds of acknowledgment of indebtedness and undertaking to pay, the contractual remedy available for the lender in the event of default by the borrowers was to sue the borrowers for the recovery of the sums. There could not be a valid set off to transfer the borrowers' properties to the lender, absent any terms linking the indebtedness with the options to purchase and a sale and purchase agreements and where the sale and transfer of the properties did not arise from the same transaction or closely connected with the indebtedness. The terms specifying the lender's remedy in the event of a default was merely illusory. In fact, the imposition of 1.5% interest per month over the indebtedness breached s. 17A(1) of the Moneylenders Act 1951, the effect of which would render the agreement null and void and of no effect, as the whole transaction involved illegal moneylending transaction.*

CONTRACT: *Sale and purchase agreement – Set off – Transfer of properties – Application to set aside sale and transfer of properties to first defendant – Plaintiffs defaulted on paying sums of indebtedness to first defendant – Whether first defendant ought to take legal action to recover sums instead of transferring properties to himself – Absence of terms linking indebtedness in deeds of acknowledgment of indebtedness and undertaking to pay with options to purchase and sale and purchase agreements – Whether there was valid set off to entitle first defendant to transfer properties to himself – Whether whole transactions involved illegal moneylending and bound to be nullified*

LAND LAW: *Transfer – Void instruments – Transfer of properties – Application to set aside sale and transfer of properties to first defendant – Plaintiffs defaulted on paying sums of indebtedness to first defendant – Whether first defendant ought to take legal action to recover sums instead of transferring properties to himself – Absence of terms linking indebtedness in deeds of acknowledgment of indebtedness and undertaking to pay with options to purchase and sale and purchase agreements – Whether there was valid set off to entitle first defendant to transfer properties to himself – Whether whole transactions involved illegal moneylending and bound to be nullified*

The two actions, Suit 26/12 and Suit 1/1 were jointly tried. The plaintiff in Suit 26/12 ('Harun') was the son of the plaintiff in Suit 1/1 ('Dayang'). The plaintiffs sought similar reliefs in these actions. In gist, they sought to set aside the sale and transfer of their respective properties to the first defendant. The first defendant counterclaimed, *inter alia*, for declarations that he was the

- A legal and rightful owner of the said properties. In Suit 26/12, the subject matter was a piece of land ('Harun's land'). In Suit 1/1, there were three separate properties involved belonging to Dayang, which were Lot 188, Lot 189 and one unit of double-storey detached house ('properties'). A determinative issue in both suits was whether the deeds and sale and purchase agreement between them were such that the first defendant was entitled in law to transfer the properties into his name. Harun testified that he obtained a loan of RM1,000,000 from the first defendant to be used as capital for his business. According to Harun, the first defendant agreed to, but had asked for securities and that subsequently, he had together with Dayang gone to the office of the first defendant's solicitors on several occasions where they were asked to sign documents which he claimed were not explained to them but that they were only for the purpose of securing his loan. Harun testified that he never intended to sell his land as it was valued much more than the loan that he took from the first defendant and would have gained profit had he sold it. Likewise, for Dayang's properties, they were not intended to be sold as they were inherited from his late father and had sentimental values to his family. He further testified that had he known the true nature of the documents he signed, he would not have put his signature on the documents. Dayang, who also testified, echoed what Harun had stated, namely, that she had agreed to charge her properties in order to help Harun to obtain the loan to be used as capital for his business and that she did not know what were the documents she signed save for that they were for the purpose of securing the loan. The first defendant contended that sometime in July 2016, Harun had approached him to request for financial assistance for an investment for his business. Harun offered to sell his land for RM1,152,240 and also, Dayang's Lot 188 and Lot 189 for RM980,000. Sometime in November 2019, Harun again requested for financial assistance from the first defendant and offered to sell Dayang's detached house for RM250,000. According to the first defendant, both Harun and Dayang then had the deeds of acknowledgment of indebtedness and undertaking to pay and the deeds of option to purchase executed in his favour which included terms that Harun and Dayang be given a grace period until 31 December 2016 to cancel the sale of the properties and repay all the monies to him, failing which the first defendant was entitled to invoke the options to purchase. The parties had executed the sale and purchase agreements and other relevant documents including memoranda of transfer and the same were all kept with the solicitors pending the exercise of the options by the first defendant. When Harun and Dayang failed to cancel the sale and repay the monies to the first defendant by 31 December 2016, he invoked the options to purchase in his favour and subsequently instructed the said solicitors to proceed with the transfers of Harun's land and Dayang's properties into this name. With regards to his counterclaim, the first defendant also sought to claim alleged rentals in arrears. The issues that arose were (i) whether the first defendant was entitled to transfer the properties into his name; and (ii) whether there was illegal moneylending.

Held (granting plaintiffs' prayers as stated in their respective statement of claims):

- (1) By the deeds of acknowledgment of indebtedness and undertaking to pay, the plaintiffs had undertaken and agreed to pay the sums of indebtedness on or before 31 December 2016 or upon demand by the first defendant, whichever was earlier and that, in the event the plaintiffs defaulted on paying the said sums of indebtedness, the remedy provided was for the first defendant to take legal action against the plaintiffs to recover the said sums. However, the first defendant did not commence any legal action against the plaintiffs to recover the sums of indebtedness under the deeds. In fact, it was not even part of the first defendant's counterclaims against the plaintiffs. (paras 28-30)
- (2) The sale and purchase agreements did not refer to the deeds of indebtedness and undertaking to pay and/or the options to purchase. On the other hand, default of the deeds of acknowledgment of indebtedness and undertaking to pay entitled the first defendant to take legal action after 31 December 2016 and to impose on the said indebtedness an interest of 1.5% per month. Crucially, nothing was stated in the deeds of acknowledgment of indebtedness and undertaking to pay on the sale and transfer of any properties to satisfy the debts. Therefore, the alleged sale and transfer of the properties did not arise from the same transactions or was closely connected with the indebtedness acknowledged by Harun and Dayang. Thus, there could not have been a valid set off as contended by the first defendant so as to entitle him to transfer the properties to himself as he did. (paras 42 & 43)
- (3) The options to purchase referred to the sale and purchase agreements but there was nothing therein to identify that those were the eventual sale and purchase agreements relied upon by the first defendant to transfer the properties to himself. These made it immediately apparent that the transactions were anything but the run of the mill kind of sale and purchase agreements. The first defendant's contractual remedy for the plaintiffs' failure to pay the indebtedness was to sue for its recovery. The first defendant did not rely on this provision. In other words, the first defendant knew that the properties would be 'sold' to him. This, despite the fact the absence of any terms linking the indebtedness in the deeds of acknowledgment of indebtedness and undertaking to pay with the options to purchase and the sale and purchase agreements. It was also very telling on the very same date as the signing of the deeds of acknowledgment of indebtedness and undertaking to pay, Harun and Dayang purported to also sign the options to purchase provided for sale and purchase agreements over the properties to have been duly prepared and vetted. It did not take much to conclude that the term specifying the first defendant's remedy in the event of a default was merely illusory. (paras 50-54)

- A (4) The imposition of 1.5% per month over the indebtedness would have ensured that neither Harun nor Dayang could ever have repaid the same by 31 December 2016. In short, the term was a sham. Quite clearly, the interest of 1.5% per month was in breach of s. 17A(1) of the Moneylenders Act 1951 as it would have amounted to an interest of 18% per annum. The effect of such breach was to render the agreement null and void and of no effect under s. 3. This by itself was sufficient to disqualify the first defendant from relying on the deeds of acknowledgment of Indebtedness and undertaking to pay as the basis for the transfer of the properties to himself. The plaintiffs had therefore successfully established that the whole transaction involved an illegal moneylending by the first defendant and that they were bound to be nullified. The plaintiffs also established their respective claims against the first defendant on a balance of probabilities. Given this court's findings on the plaintiffs' claims, it went without saying that the first defendant's counterclaim could not be sustained. (paras 56, 61, 62 & 66)

- D **Case(s) referred to:**
Barisan Tenaga Perancang (M) Sdn Bhd v. Dr Mansur Hussain & Ors [2016] 1 LNS 1723 HC (*refd*)
Citibank Canada v. Confederation Life Insurance (1996) CanLII 8269 (*refd*)
Dato' John Lee Siew Neng v. Anuar Abdul Aziz [2020] 1 LNS 804 HC (*dist*)
- E *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1 CA (*refd*)
Mahmood Ooyub v. Li Chee Loong & Another Appeal [2020] 1 LNS 660 CA (*refd*)
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC (*refd*)
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC (*refd*)
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC (*refd*)
- F *Tan Aik Teck v. Tang Soon Chye* [2007] 5 CLJ 441 CA (*refd*)
Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] 4 CLJ 388 HC (*refd*)
Yeep Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC (*refd*)
- G **Legislation referred to:**
Moneylenders Act 1951, ss. 5, 10OA, 15, 17A(1)
For the plaintiffs - Sitti Nur Alam Mappiare & Muhammad Abdul Karim; M/s Sazalye Donol, Muhammad & Co
For the 1st defendant - Sharie Chin Ye Shan; M/s Tsang & Co
- H *Reported by Suhainah Wahiduddin*

JUDGMENT

Celestina Stuel Galid J:

I **Introduction**

[1] The two actions, SDK-22NCvC-26-12-2019 ("Suit 26/12") and SDK-22NCvC-1-1-2020 ("Suit 1/1") were jointly tried.

[2] The plaintiff in Suit 26/12 is the son of the plaintiff in Suit 1/1. They will be respectively referred to herein as “Harun” and “Dayang” unless collectively referred to as “the plaintiffs”. A

[3] The plaintiffs had sought for similar reliefs in these actions. In gist, they sought to set aside the sale and transfer of their respective properties to the first defendant. The first defendant counterclaimed, *inter alia*, for declarations that he was the legal and rightful owner of the said properties. B

[4] The second and third defendants who were sued as nominal defendants did not participate in the trial but had, through learned State Counsel, indicated that they would abide by the court’s decision. C

[5] On 18 February 2022, this court allowed the plaintiffs’ claims and dismissed the first defendant’s counterclaims. I now provide the grounds thereto.

Subject Matter Of The Claims

[6] In Suit 26/12, the subject matter was the land measuring 58.29 hectares situated at Kg Suan Lamba, Sandakan held under CL 075536220 (hereinafter referred to as “Harun’s land”). D

[7] In Suit 1/1, there were three separate properties involved all belonging to Dayang (hereinafter collectively referred to as “Dayang’s properties”) namely: E

(i) one unit of double-storey semi-detached house known as Lot No. 188, Astana Heights, Phase 2A situated at Jalan Lalang, Off Mile 1½ North Road Sandakan held under Master Title No. CL 075145103 (“Lot 188”); F

(ii) one unit of double-storey semi-detached house known as Lot No. 189, Astana Heights, Phase 2A situated at Jalan Lalang, Off Mile 1½, North Road Sandakan held under Master Title No. CL 075145103 (“Lot 189”); and G

(iii) one unit of double storey detached house situated at Mile 1.5, Jalan Utara, Jalan Bunga Botan, Sandakan held under TL 077515443 (“detached house”).

[8] Collectively, all of Harun’s land and Dayang’s properties shall be referred to as “the properties”. H

Analysis And Decision

[9] The parties have filed a statement of agreed issues to be tried in each of the suits. However, I was of the view that a determinative issue in both suits was whether the deeds and sale and purchase agreements between them were such that the first defendant was entitled in law to transfer the properties into his name. I

- A [10] In respect of Harun's land, the following were the relevant documents:
- (i) deed of acknowledgment of indebtedness and undertaking to pay dated 26 July 2016 the sum of RM1,152,240 by Harun in favour of the first defendant;
- B (ii) deed of option to purchase dated 26 July 2016 by Harun in favour of the first defendant; and
- (iii) sale and purchase agreement dated 26 January 2017 between Harun and the first defendant.
- C [11] In respect of Dayang's properties, they were:
- (i) deed of acknowledgment of indebtedness and undertaking to pay the sum of RM480,000 dated 26 July 2016 by Dayang to the first defendant;
- D (ii) a deed of option to purchase (Lot 188) dated 26 July 2016 in favour of the first defendant;
- (iii) a sale and purchase agreement dated 10 January 2017 between Dayang and the first defendant over Lot 188;
- E (iv) deed of acknowledgment of indebtedness and undertaking to pay the sum of RM500,000 dated 26 July 2016 by Dayang to the first defendant;
- (v) a deed of option to purchase (Lot 189) dated 26 July 2016 in favour of the first defendant;
- F (vi) a sale and purchase agreement dated 10 January 2017 between Dayang and the first defendant over Lot 189;
- (vii) deed of acknowledgment of indebtedness and undertaking to pay the sum of RM250,000 dated 9 November 2016 by Dayang to the first defendant;
- G (viii) a deed of option to purchase (the detached house) dated 9 November 2016 in favour of the first defendant; and
- (ix) a sale and purchase agreement dated 1 February 2017 between Dayang and the first defendant over the detached house.
- H **The Plaintiffs' Contentions**
- I [12] Harun testified that he did obtain a loan of RM1,000,000 from the first defendant, that it was used as capital for his own business. He said that the first defendant agreed to but had asked for securities and that subsequently, he had together with Dayang gone to the office of the first defendant's solicitors on four different occasions where they were asked to sign documents which he claimed were not explained to them but that they were only for the purpose of securing his loan.

[13] Harun testified that he never intended to sell his land as it was valued much more than the loan that he took from the first defendant and would have gained profit had he sold it. Likewise, for Dayang's properties, they were not intended to be sold as they were inherited from his late father and had sentimental values to his family as their family lived in them previously. He further testified that had he known the true nature of the documents he signed, he would not have put his signature on the documents.

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[14] Dayang who also testified echoed what Harun had stated namely that she had agreed to charge her properties in order to help Harun to obtain the loan to be used as capital for his business and that she did not know what were the documents she signed save for that they were for the purpose of securing the loan.

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The First Defendant's Contentions

[15] The first defendant contended that sometime in July 2016, Harun approached him to request for financial assistance for an investment for his business. Harun offered to sell his land for RM1,152,240 and also, Dayang's Lot 188 and Lot 189, for RM980,000. Sometime in November 2019, Harun again requested for financial assistance from the first defendant and offered to sell Dayang's detached house for RM250,000.

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[16] According to the first defendant, both Harun and Dayang then had the deeds of acknowledgment of indebtedness and undertaking to pay and the deeds of option to purchase executed in his favour which included terms that Harun and Dayang be given a grace period until 31 December 2016 to cancel the sale of the properties and repay all the monies to him, failing which the first defendant was entitled to invoke the options of purchase.

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[17] The parties had executed the sale and purchase agreements and other relevant documents including memoranda of transfer and the same were all kept with Messrs Chin Lau Wong & Foo ("the said solicitors") pending the exercise of the options by the first defendant.

[18] When Harun and Dayang failed to cancel the sale and repay the monies to the first defendant by 31 December 2016, he invoked the options to purchase in his favour and subsequently instructed the said solicitors to proceed with the transfers of Harun's land and Dayang's properties into his name.

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[19] With regards to his counterclaim, the first defendant testified that under the sale and purchase agreements with Dayang, he was entitled to charge RM4,000 per month as rental for Lot 188 and Lot 189 in the event vacant possession was not delivered to him. He said that the plaintiffs did make payments but that they were irregular and as at 31 January 2019, the outstanding rentals was RM284,000. By his counterclaim, the first defendant also sought to claim the alleged rentals in arrears.

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A *Was The First Defendant Entitled To Transfer The Properties Into His Name?*

[20] At the outset it was of much significance that the first defendant's defence was not that he had purchased the properties within the meaning of a straightforward sale and purchase transactions.

B [21] This was what the first defendant had pleaded (para. 13, encl. 9 in Suit 26/12):

C Paragraph 16 of the SOC is denied. The first defendant avers that he had invoked the said Option to purchase the said Land and the sum owed by the plaintiff to the first defendant was agreed upon to set off the full purchase price for the sale of the said Land. Essentially, a sale and purchase agreement dated 26 January 2017 and other relevant documents had been executed between both parties to that effect. In this respect, the allegation that the first defendant had never fulfilled the terms and conditions in the said Option is totally unfounded and is mere afterthought. Therefore, the plaintiff is put to strict proof thereof.

D [22] A similar averment was made in Suit 1/1 (at para. 12, encl. 8):

E Paragraph 18 of the SOC is denied. The 1st defendant avers that he had invoked the said Option to purchase the said Properties and the total sum owed by the plaintiff to the first defendant was agreed upon to set off the full purchase price for the sale of the said Properties. Essentially, three (3) sets of sale and purchase agreement dated 10.01.2017 and 01.02.2017 respectively and other relevant documents had been executed between both parties to that effect. In this respect, the allegation that the first defendant had never fulfilled the terms and conditions in the said Options is totally unfounded and is mere afterthought. Therefore, the plaintiff is put to strict proof thereof.

F [23] It was the evidence of the first defendant that by end of December 2016, Harun had not cancelled the sale of the properties despite his attempts to contact Harun. In January 2017, when the first defendant managed to finally contact Harun, the latter informed him that he had 'lost his investment' and asked that the first defendant proceeded with the sale. The first defendant then instructed the said solicitors to effect the transfers of the properties and to have the sale and purchase agreements stamped.

G [24] The determination of this issue entailed a closer look at the relevant documents which resulted in the transfers of the properties.

H [25] Firstly, there were the deeds of acknowledgment of indebtedness and undertaking to pay signed by Harun and Dayang of the sums of RM1,152,240, RM480,000, RM500,000 and RM250,000.

I [26] As a side note, the parties had identified the first issue as to whether the first defendant had paid in full the sums of RM1,152,240 and RM1,230,000 pursuant to the deeds of acknowledgment and undertaking to pay executed by Harun and Dayang. However, it was also part of the agreed facts that Harun and Dayang had acknowledged such indebtedness as

part of the agreed facts in the trial. I was therefore of the view that this issue had been rendered superfluous and went on to consider the main issue at hand.

[27] It was not in dispute that the deeds of acknowledgment of indebtedness and undertaking to pay all have similar terms and conditions (as the one reproduced below):

**DEED
OPTION TO PURCHASE
CAVEATABLE INTEREST**

To: SHIM VUI GEH
(U/C No. 630529-12-5011)
P. O. Box 2305,
90726 Sandakan,

In consideration of the sum of RM1,152,240.00 (Ringgit Malaysia one million one hundred fifty two thousand two hundred and forty only) (the receipt whereof I hereby acknowledge), I, MOHD HARUN INDRA BIN PG ELIAS (U/C No. 770609-12-5001) of W D T 127, 90500 Sandakan, Sabah, Malaysia do hereby warrant and confirm to you that I am the registered owner of one piece of land measuring 58.29 hectares or 144.03 acres situate at Kg. Sum Lamba, Sandakan held under Title No. Country Lease No. 075536220 (hereinafter referred to as "the said property") and I hereby grant to you an option to purchase the said property at the total consideration of RM1,152,240.00 (Ringgit Malaysia one million one hundred fifty two thousand two hundred and forty only) on the following terms and conditions:-

1. Total consideration at RM1,152,240.00.
2. I agree and our lawyer had duly vetted the Sale and Purchase Agreement duly prepared by Messrs Chin Lau Wong & Foo, Sandakan.
3. You are entitled to the equitable remedy of specific performance should I attempt to terminate this Option.
4. Henceforth this Option is deemed sufficient legal basis for you to register Caveat against the said title C.L. 075536220; and that you have caveatable interest.
5. This Option to Purchase shall bind the executor, administrator, heir or next-of-kin of the parties hereto.
6. I hereby undertake to deliver the original copy of the Sale and Purchase Agreement and any documents to Messrs Chin Lau Wong & Foo, Sandakan free from encumbrances within fourteen (14) days from the date of a notice to be served on us at this address: Batu 1 ¾, Jalan Bunga Botan, W. D. T. 127, Pejabat Pos Rumah Persekutuan, 90500 Sandakan, Sabah, Malaysia.

Dated this day of 26 JUL 2016 2016.

SIGNED by MOHD HARUN INDRA)
BIN PG ELIAS in the presence of-)


TERNA HERNI SHRI
L.L.S.(HONS)(BUM)
Advocate & Solicitor
Sabah, Malaysia.
Sahab High Court Sdn Bhd No 6030005

[28] As rightly pointed out by learned counsel for the plaintiffs, by the deeds of acknowledgment of indebtedness and undertaking to pay, the plaintiffs had undertaken and agreed to pay the sums of indebtedness on or before 31 December 2016 or upon demand by the first defendant, whichever

A was earlier and that in the event the plaintiffs defaulted on paying the said sums of indebtedness, the remedy provided was for the first defendant to take legal action against the plaintiffs to recover the said sums.

[29] However, there was no dispute that the first defendant did not commence any legal action against the plaintiffs to recover the sums of indebtedness under the deeds. In fact, it was not even part of the first defendant's counterclaims against the plaintiffs.

[30] Instead, the first defendant purportedly exercised the options to purchase signed by Harun and Dayang which all bore similar terms and conditions (see below):

DEED
OPTION TO PURCHASE
CAVEATABLE INTEREST

To: SHIM VUI GEH
(UC No. 630529-12-5011)
P. O. Box 2305,
90726 Sandakan.

In consideration of the sum of RM1,152,240.00 (Ringgit Malaysia one million one hundred fifty two thousand two hundred and forty only) (the receipt whereof I hereby acknowledge), I, MOHD HARUN INDRA BEN PG ELIAS (UC No. 770609-12-5001) of W D T 127, 90500 Sandakan, Sabah, Malaysia do hereby warrant and confirm to you that I am the registered owner of one piece of land measuring 58.29 hectares or 144.03 acres situate at Kg. Sun Lamba, Sandakan held under Title No. Country Lease No. 075536220 (hereinafter referred to as "the said property") and I hereby grant to you an option to purchase the said property at the total consideration of RM1,152,240.00 (Ringgit Malaysia one million one hundred fifty two thousand two hundred and forty only) on the following terms and conditions:-

1. Total consideration at RM1,152,240.00.
2. I agree and our lawyer had duly vetted the Sale and Purchase Agreement duly prepared by Messrs Chin Lau Wong & Foo, Sandakan.
3. You are entitled to the equitable remedy of specific performance should I attempt to terminate this Option.
4. Henceforth this Option is deemed sufficient legal basis for you to register Caveat against the said title C.L. 075536220; and that you have caveatable interest.
5. This Option to Purchase shall bind the executor, administrator, heir or next-of-kin of the parties hereto.
6. I hereby undertake to deliver the original copy of the Sale and Purchase Agreement and any documents to Messrs Chin Lau Wong & Foo, Sandakan free from encumbrances within fourteen (14) days from the date of a notice to be served on us at this address: Batu 1 ¼, Jalan Bunga Botan, W. D. T. 127, Pejabat Pos Rumah Persekutuan, 90500 Sandakan, Sabah, Malaysia.

Dated this day of 26 JUL 2016.

SIGNED by MOHD HARUN INDRA)
BEN PG ELIAS in the presence of:)

L. B. (BONE) (BUN)
Advocate & Solicitor
Sabah, Malaysia.
Sahlin High Court Seal No. 6580055

[31] Now, immediately one could see that there was no mention as to under what circumstances the options were exercisable by the first defendant. What the options did show was at the time the options were executed, there were already sale and purchase agreements of the properties prepared. Of crucial significance was the fact that the terms of the options to purchase did not make any reference to the deeds of acknowledgment of indebtedness and undertaking to pay at all nor the time frame for settlement of the indebtedness of until 31 December 2016.

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[32] Likewise, the respective sale and purchase agreements made no reference to the deeds of acknowledgment of indebtedness and undertaking to pay and or the options to purchase. The only thing was that considerations provided under the said agreements were of the same amount as the indebtedness sums in the deeds and options and that the considerations had been acknowledged by Harun and Dayang to have been paid in full.

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[33] The first defendant must have been aware of the predicament all these presented to his case when he pleaded that the plaintiffs' indebtedness was allegedly agreed by the parties to be set off against the full purchase price for the sale of the properties. Hence, the invitation to the court to consider the question of whether the first defendant was entitled to set off the full purchase price of RM1,152,240, RM480,000, RM500,000 and RM250,000 stated in the sale and purchase agreements he entered with Harun and Dayang in respect of the properties as against Harun and Dayang's indebtedness.

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[34] Firstly, there was no dispute that the sale and purchase agreements did not contain a set off clause.

[35] The first defendant relied on cl. 2 of the sale and purchase agreements to contend that Harun and Dayang had acknowledged having received the respective sums stated thereunder. It was further contended that there being no provision prohibiting a set off or an exclusion clause to disallow a set off, the court ought to have regard to common law in considering the issue.

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[36] In support, learned counsel for the first defendant cited the Ontario Supreme Court case of *Citibank Canada v. Confederation Life Insurance* (1996) CanLII 8269 where the court had stated as follows:

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[35] Set-off may arise contractually, or at law (including by statute), or in equity: see, generally, *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.).

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[36] No question of contractual set-off exists here.

[37] For set-off at law to occur, the following circumstances must arise:

1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
2. Both debts must be mutual cross-obligations, *ie*, cross-claims between the same parties and in the same right.

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- A [38] Not surprisingly, for set-off to occur in equity, the requirements are more relaxed. There is no necessity for mutuality. The cross-obligations need not be debts, but may be for a sum of money whether liquidated or unliquidated. However, the cross-claims for money must be connected or interrelated in some manner which would make it unjust to permit one party to enforce payment without accounting for the existence of the
- B other claim.
- C [37] It was submitted that the first defendant was entitled in law and in equity to set off the indebtedness of Harun and Dayang with the purchase prices to be paid by them to the first defendant. That the cross-claims for the money were connected or interrelated to the advances made by the first defendant to the plaintiffs leading to the sale and purchase of the properties. It was further submitted that it would be unjust for the first defendant to pay the purchase prices to the plaintiffs without setting off the plaintiffs' indebtedness.
- D [38] With due respect, it was not necessary to go outside of the jurisdiction to have regard to the law on set offs. The Federal Court had in fact laid down the law clearly in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 at p. 246 where Salleh Abbas LP explained as follows:
- E What is set-off?
- F A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross-claim is not necessarily a set-off, merely because the word used in the pleading is "set-off". Whether or not the plea is a set-off it has to be determined as a matter of law and substance: *Hanak v. Green* [1958] 2 QB 9. A cross-claim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiff's claim. See *In re A Bankruptcy Notice* [1934] Ch 431. But to constitute a set-off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence
- G to the plaintiff's claim and not as a separate cause or matter.
- [39] This court was further guided by what the Federal Court had stated in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833 where Chong Siew Fai CJ (Sabah & Sarawak) held as follows:
- H As to the sort of cross-claims that can be deducted by way of equitable set-off, the following observations of Lord Denning in *Federal Commerce Ltd v. Molena Alpha Inc* [1978] 1 QB 927 CA is enlightening. After dealing with abatement at common law, he said at pp. 974-975:
- I But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. They allowed deductions - by way of equitable set off whenever there were good equitable grounds for directly impeaching the demand which the creditor was seeking to enforce: see *Rawson v. Samuel* [1841] Cr & Ph 161 at pp 178-179, per Lord Cottenham LC. These grounds were never

precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out. Over 100 years have passed since the Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Judicature Act? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? See *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904, per Lord Diplock. This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us. *But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.*

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(emphasis added)

[40] On the above authorities, I was of the considered view that the first defendant bore the burden of satisfying this court that the indebtedness acknowledged by Harun and Dayang either arose from the same transactions as the sale and purchase agreements or were closely connected with them.

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[41] However, as noted above, learned counsel for the first defendant had only referred to the fact that Harun and Dayang had acknowledged the said debts to submit that the cross-claims for the money were connected or interrelated to the advances made by the first defendant to Harun and Dayang leading to the sale and purchase of the properties. No submission and/or reference to any evidence in support of such contention.

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[42] To the contrary, as already noted earlier, the sale and purchase agreements did not even refer to the deeds of indebtedness and undertaking to pay and or the options to purchase. On the other hand, as correctly pointed out by learned counsel for the plaintiffs, default of the deeds of acknowledgment of indebtedness and undertaking to pay entitled the first defendant to take legal action after 31 December 2016 and to impose on the said indebtedness an interest of 1.5% per month. Crucially, nothing was stated in the deeds of acknowledgment of indebtedness and undertaking to pay on the sale and transfer of any properties to satisfy the debts.

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[43] It was therefore this court's finding that the alleged sale and transfer of the properties did not arise from the same transactions or closely connected with the indebtedness acknowledged by Harun and Dayang. Thus, there could not have been a valid set off as contended by the first defendant so as to entitle him to transfer the properties to himself as he did.

I

A *Whether There Was Illegal Moneylending?*

[44] The plaintiffs had contended that the whole of the transactions involved an illegal moneylending by the first defendant contrary to s. 15 of the Moneylenders Act 1951 (“the Act”). In particular, the court’s attention was drawn to the fact that under the deeds of acknowledgment of indebtedness and undertaking to pay, an interest of 1.5% per month was to be imposed on the indebtedness, which according to learned counsel for the plaintiffs was proof of a single loan at interest which in turn raised a presumption that the first defendant was carrying on the business of moneylending.

C [45] In rebuttal, learned counsel for the first defendant submitted that the plaintiffs’ arguments could not be supported as:

(i) there was no evidence led as to whether the first defendant had carried on, advertised, announced himself or held himself to be carrying on the business of moneylending;

(ii) there was no evidence that first defendant had lent money for gain systematically, continuously or repetitively in a way that justified a finding of fact that he had been carrying on a business of moneylending; and

(iii) there was no evidence that the alleged “loan” was granted with interest.

[46] In support, learned counsel cited s. 5 of the Act and the cases: *Dato’ John Lee Siew Neng v. Anuar Abdul Aziz* [2020] 1 LNS 804; *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9, *Barisan Tenaga Perancang (M) Sdn Bhd v. Dr Mansur Hussain & Ors* [2016] 1 LNS 1723; *Tan Aik Teck v. Tang Soon Chye* [2007] 5 CLJ 441; *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169; [1981] 1 MLJ 14; and *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388.

[47] I will deal with the authorities cited by learned counsel for the first defendant at the later part of this judgment but at the outset, I had in mind what the Court of Appeal had stated in *Mahmood Ooyub v. Li Chee Loong And Another Appeal* [2020] 1 LNS 660; [2020] 6 MLJ 755 in relation to the issue of whether the trial court is confined to the four corners of the sale and purchase agreements and related documents in determining the true nature of the transactions.

[48] The Court of Appeal held that it:

[211] ... behooves the trial court, when there is the allegation that the agreement is a sham and a fabrication with the object of circumventing the law, to examine the external evidence to see if the pieces in the puzzle would fit to form a coherent whole. The court must probe further to see if there are unusual features in the agreement as in here, a sale and

purchase agreement and examine the circumstantial evidence such as the conduct of the parties that may arouse suspicion if not setting off the alarm bell.

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[214] The court in scrutinising the transaction is duty bound to shine the search light of consistency and coherence and to see if there are contradictions that cry out for an explanation.

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[215] No one factor is conclusive but if when taken together more questions are raised than there are satisfying answers, then in all probabilities the agreement is a sham and fabrication to camouflage and counterfeit the real transaction, which if allowed would contravene the law. The dressing up and decoy is deliberately if not delicately designed to escape detection by the enforcement authority and to deceive the weaker party when the crunch comes. The 'deal' is structured in such a way that the substance is shielded from detection.

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[49] As noted earlier, the sale and purchase agreements were not made out by the first defendant to be the normal run of the mill sale and purchase agreements. The first defendant himself invited the court to refer to the deeds of acknowledgment of indebtedness and undertaking to pay and the deeds of option to purchase to come to the conclusion that he really did purchase the properties and the payments were by way of a set off against the indebtedness by Harun and Dayang.

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[50] As also noted earlier, the sale and purchase agreements did not make any reference to the options to purchase and or the deeds of acknowledgment of indebtedness and undertaking to pay. Neither did the deeds of acknowledgment of indebtedness and undertaking to pay make any reference to either the options to purchase and or the sale and purchase agreements. The options to purchase did refer to sale and purchase agreements but there was nothing therein to identify that those were the eventual sale and purchase agreements relied upon by the first defendant to transfer the properties to himself. These made it immediately apparent that the transactions were anything but the run of the mill kind of sale and purchase agreements.

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[51] Learned counsel for the plaintiffs cited the case of *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1; [2020] 6 MLJ 333 where the court held that unusual feature(s) in an agreement gave rise to doubt as to the genuineness of the transaction. In that case, the Court of Appeal had said:

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[152] The device of using a sale and purchase agreement as a security for a loan is clearly to circumvent the protective provisions of the Moneylenders Act 1951. Even if the plaintiff lender is not a moneylender at all it would be an aberration to allow such a person to charge interest of RM400,000 for a loan of three months when even a licensed moneylender would blush under it. A person who is not a moneylender cannot under the guise of a friendly loan exact more onerous terms than what a licensed moneylender is permitted as that would turn the law upside down.

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- A [52] There were many unusual features in the documents relied on by the first defendant here to say the least. Firstly, as already noted, the first defendant's contractual remedy for the plaintiffs' failure to pay the indebtedness was to sue for its recovery. The first defendant did not rely on this provision.
- B His testimony (Q/A212, DW1-WS) on this was rather revealing:
- Q: Harun in his pleadings said that the Deed provides that if he defaults you are entitled to sue him but you did not. What have you to say to this?
- C A: It was agreed that if he did not cancel the sale by end December 2016, the land would be sold to me. Since the land had been sold to me and had been transferred to me, why would I sue him.
- D [53] In other words, the first defendant knew that the properties would be "sold" to him. This, despite the fact the absence of any terms linking the indebtedness in the deeds of acknowledgment of indebtedness and undertaking to pay with the options to purchase and the sale and purchase agreements.
- E [54] It was also very telling that on the very same date as the signing of the deeds of acknowledgment of indebtedness and undertaking to pay, Harun and Dayang purported to also sign the options to purchase. Given that the options to purchase provided for sale and purchase agreements over the properties to have been duly prepared and vetted, it did not take much to conclude that the term specifying the first defendant's remedy in the event of a default was merely illusory.
- F [55] By the same token, the purported time frame of until 31 December 2016 for the plaintiffs to pay the indebtedness was made ineffective as there was nothing stated in either the options to purchase and/or the sale and purchase agreements that the options were only exercisable after 31 December 2016. Although the sale and purchase agreements were all dated after 31 December 2016, it must be borne in mind that together with the memoranda of transfer, they were all already executed when the deeds of acknowledgment of indebtedness and undertaking to pay were. This was apparent from the testimony of PW3, the solicitor who attended to their signing. In short, there was nothing to preclude the first defendant from relying on the sale and purchase agreements and memoranda of transfer even before 31 December 2016.
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- I [56] Still further, the imposition of 1.5% per month over the indebtedness would have ensured that neither Harun nor Dayang could ever have repaid the same by 31 December 2016. In short, the term was, but a sham. This court's view was fortified by the lucid pronouncement by Lee Swee Seng JCA in *Mahmood Ooyub* which facts were not unlike the present.

[57] There, property owners had used their properties as collateral to borrow loans from individuals. In each case, the loans were secured against sale and purchase agreements of the properties concerned and the appellants also had to sign in blank memorandum of transfer and deposit their title deeds to the properties with the solicitors acting for the lenders. In each case, when the appellants could no longer pay the exorbitant interest rates charged on the loans, the lenders commissioned the sale and purchase agreements and memorandum of transfer to wrest away the properties of the appellants. The High Court gave effect to the agreements.

[58] In allowing the property owners' appeals, His Lordship held as follows:

[227] It is not disputed that Li Chee Loong in Mahmood's appeal and Lim Len Tat in Tan Bok Eng's appeal and Pusphavalli's appeal are unlicensed moneylender and the agreements in the SPAs are unenforceable as s. 15 of the Act declares as follows:

15 Contract by unlicensed moneylender unenforceable **No moneylending agreement** in respect of money lent after the coming into force of this Act by an **unlicensed moneylender shall be enforceable.**

[228] From the evidence adduced the borrowers had proved. That interest had been charged and a very exorbitant one at that such that they could not continue paying anymore. The interest alone was enough to 'kill' them and whatever payment made is like throwing money into a bottomless pit. Section 2 of the Moneylenders Act 1951 defines 'moneylending' to mean 'the lending of money at interest, with or without security, by a moneylender to a borrower'.

[229] The definition of 'moneylender' is as follows:

'moneylender' means any person who **carries on** or advertises or announces himself or holds himself out in any way as carrying on **the business of moneylending**, whether or not he carries on any other business;

[230] It is not open to Li Chee Loong and Lim Len Tat to say they are not moneylenders and indeed they did not say that because the position taken by them was that it was a straight forward SPA. At any rate even a single loan at interest is enough to raise the presumption of that person carrying on the business of moneylending under the amendment effected by the Moneylenders (Amendment) Act 2011 which came into force on 15 April 2011. It introduced s 10OA which according to the Explanatory Statement to the Bill, seeks to facilitate the proof of business of moneylending. Section 10OA makes it even more difficult for a lender who had charged interest on the loan given to say it was a one off transaction by allowing a legal presumption to be drawn against the lender as follows:

- A 10OA Presumption as to the business of moneylending
Where in any proceedings against any person, it is alleged that such person is a moneylender, **the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending**, until the contrary is proved.
- B

(emphasis added)

- [59] This brought me to the case of *Dato' John Lee Siew Neng v. Anuar Abdul Aziz* relied on by the defendants. With respect, the High Court's opinion therein that the presumption under s. 10OA of the Act that a person is carrying on the business of moneylending upon proof of a single loan at interest did not apply to a civil action must be looked at in the light of the Court of Appeal's decision in *Mahmood Ooyub* which found to the contrary. Likewise, the rest of the cases relied on by the first defendant were distinguishable as they were all decided before the amendment to include s. 10OA of the Act.
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[60] While still on the issue of the 1.5% per month interest, it was relevant to consider s. 17A(1) of the Act which provides as follows:

- E (1) For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum.
- (2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a court, having regard to all the circumstances, otherwise decrees.
- F (3) Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.
- G (4) Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both.

- [61] Quite clearly, the interest of 1.5% per month was in breach of s. 17A(1) of the Act as it would have amounted to an interest of 18% per annum. The effect of such breach was to render the agreement null and void and of no effect under sub-s. (3). This by itself was sufficient to disqualify the first defendant from relying on the deeds of acknowledgment of indebtedness and undertaking to pay as the basis for the transfer of the properties to himself.
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[62] It was thus this court's judgment that the plaintiffs have established that the whole transactions involved an illegal moneylending by the first defendant and that they were bound to be nullified. In coming to such conclusion, this court was aware of the agreed fact that the plaintiffs acknowledged the indebtedness. However, there were no claims of unjust enrichment by the first defendant in his defence and or his counterclaim. This was very much like the lenders in *Mahmood Ooyub* where the Court of Appeal had this to say:

Whether This Court Should Order Restitution In That There Would Be Unjust Enrichment If Even The Balance Principal Sum Is Not Repaid

[257] To begin with the lenders had not pleaded this in their respective statement of claims. We cannot give a relief not pleaded especially when the case was not fought on the alternative plea that if it is a moneylending transaction then the court should grant judgment for the principal balance sum not paid.

[258] Parties are bound by their pleadings and they cannot approbate and reprobate. See *Samuel Naik's* case. Having gone for broke as it were in confidently asserting that it was a sale and purchase transaction, it is then too late to now want to claw back on the high moral ground of unjust enrichment.

[259] In the Singapore Court of Appeal's case of *Ochroid Trading Ltd And Another v. Chua Siok Lui (Trading as VIE Import & Export) And Another* [2018] 1 SLR 363; [2018] SGCA 5 where a specially convened panel of five Judges of Appeal sat to deliberate on this same issue in the light of *Patel v. Mirza* [2017] AC 467 watershed decision by the UK Supreme Court on illegality and restitution, the lender there had pleaded in the alternative a repayment of the balance principal sum not paid and the Court of Appeal had dismissed that, affirming the decision of the High Court that the joint venture investment agreement was null and void and unenforceable under the Singapore Moneylenders Act.

[260] At any rate we have given careful consideration to this plea though not pleaded in the statement of claim of the lenders and we are of the view that to allow restitution would be to allow the lenders to mock the law prohibiting illegal moneylending under the Moneylenders Act 1951.

[63] This court held the same sentiment.

[64] On the totality of the evidence, it was this court's finding that the plaintiffs have established their respective claims against the first defendant on a balance of probabilities. The plaintiffs' prayers as stated in their respective statement of claims were therefore granted with costs subject to allocator.

A The First Defendant's Counterclaim

[65] In the first defendant's counterclaim, the first defendant had averred that by making the allegations in their statements of claim, the plaintiffs had committed the torts of injurious falsehood, the tort of abuse of process by making false statements and claimed for damages to be assessed and for punitive and or exemplary or aggravated damages.

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[66] Given the court's findings on the plaintiffs' claims, it went without saying that the first defendant's counterclaim could not be sustained. Both of the counterclaims in the two suits were therefore dismissed with costs subject to allocator.

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